

**(1984) 09 DEL CK 0050**

**In the Delhi High Court**

**Case No :** Election First Appeal No. 1 of 1983

Shalimar Cinema and Another

APPELLANT

Vs

Bhasin Film Corporation and Another

RESPONDENT

**Date of Decision :** 26-09-1984

**Acts Referred:**

**Citation :** AIR 1984 Delhi 181 : (1985) ILR Delhi 14

**Hon'ble Judges :** Rajinder Sachar, J

**Bench :** Single Bench

**Advocate :** C.L. Sanghi, Mukul Rohatagi and K.K. Mehra, for the Appellant;

## Judgement

Jagdish Chandra, J.

(1) This EFA(OS) has arisen out of and is directed against the order dated 10-1-1983 passed by G. R. Lirthra J. whereby the application under Order 21 Rule 90 read with Section 151 of the CPC (hereinafter to be referred to as CPC .) for setting aside the auction sale held on 1-9-1977 of 28/48 shares of the Judgment-debtors Shamiudin and Nasimudin in an immovable property known as "Shalimar Corporation & another cinema, Bhogal, New Delhi", in execution of a decree for Rs. 1,44,973.00 passed in favor of decree-holder M/s bhasin Film Corporation against Shamiudin and Nasimudin. each of the above-mentioned judgment-debtors held 14/28 shares in the Shalimar Cinema.

(2) The objections contained in the application under Order 21 Rule 90 CPC were resisted both by the decree-holder as well as the auction-purchaser M/s Malhotra Brothers exhibitors (P) Limited.

(3) The following issues were framed by the learned single Judge on April 17, 1979:

1. Whether objections under Order 21 Rule 90 of the CPC are maintainable in respect of the properties mentioned in the objection.s? OPJD. 2. Whether the objectors arc estopped to raise any objection in view of their conduct in the

proceeding? OPDH. 3. Whether the sale is liable to be set aside on the grounds of material irregularities fraud in publishing and conducting the sale and on the grounds taken in UK. objection-petition? OPJD. 4. Relief.

(4) The perusal of the order under appeal shows that issues No. 1 and 2 were not pressed at the time of arguments before the learned Single Judge by the decree-holder and the auction purchaser with, the result the same were decided in favor of the judgment-debtors by the learned Single Judge who, however, decided issue no. 3 against the judgment-debtors and ultimately the objection-petition of the judgment-debtors was dismissed with costs and the auction sale in question was confirmed in favor of the auction-purchaser Mis Malhotra Brothers Exhibitors (I\*) Limited.

(5) A number of objections and contentions were raised by the learned counsel for the judgment-debtors challenging the validity and correctness of the aforesaid impugned order dated 10-1-83. First of all it was urged that no notice as required under Order 21 Rule 66 CPC was given to or served upon the Judgment-debtors prior to the sale in question and such a notice being mandatory and fundamental in nature and going to the root of the matter and thus affecting the jurisdiction of the executing court holding the sale, the sale was rendered nullity on account of this omission which was not a mere irregularity to be dealt with under order 21 Rule 90 CPC and in support of this contention the learned counsel relied upon some authorities and the same are Narayan Purshottam Bansod Vs Ramchandra Mudgiliji Choudharkar and others Air 1948 Nagpur 177 Dada- narayan Dada Narayan Thakre Vs. Jaichand Nagorao and Another, ; Balwant Rai Kumar Vs. Smt. Amrit Kaur, ; Dr. Cherian Vs. P. Ramasami Naidu and Others, and Mannem Peda Narisi Reddi Vs. Maddivenkayya (Died) and Others, . Narayan Purshottam's case (supra) was the basic authority which was relied upon in Dadanarayan Thakre's case (supra) which in turn was relied upon in Balwant Raj Kumar's case (supra). On the other hand, the learned counsel for the section purchaser placed reliance on Uma Datt Vs. R.K. Sardana and Another, ; AIR 1945 178 (Privy Council) and Dharendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, . The most important authority which clinches the matter on this point against the judgment-debtors? objectors is furnished by Dharendra Nath Gorai's case (supra) inasmuch as it lays down a definite and the safest test for determining, what is an irregularity under order 21 Rule 90 CPC and what is a nullity, even though this authority does not in terms assess the result of the omission to give to a judgment-debtor the notice Corporation & another under Order 21 Rule 66 CPC and was in fact concerned with the result of non-compliance with Section 35 of the Bengal Money Lenders Act (10 of 1940) which was a provision relating to the contents of the sale proclamation and its effect is to amend or Supplement Order 21 Rule 66(2) (a) which directs the court to specify in the sale proclamation "the property to be sold" and the objection regarding non-compliance with S. 35 in specifying the property to be sold was held to be a defect in the sale proclamation within the meaning of sub-rule (2) of Order 21 Rule 90 and wherein

it was consequently held that an objection that the sale proclamation did not conform to Section 35 of the Bengal Money Lenders Act could not avail a judgment-debtor in an application under Order 21 Rule 90 CPC if he was present at the drawing up of the sale proclamation and did not raise any such objection at time nor could it avail a judgment-debtor who after receiving notice did not attend at the drawing up of the sale proclamation at all. This authority laid down the rule to determine, what is irregularity and what is a nullity as follows:

THE safest rule to determine what is an irregularity and what is nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot it is a nullity. A waiver is an intentional relinquishment of a known right but obviously an objection to jurisdiction cannot be waived for consent cannot give a court jurisdiction where there is none. Where such jurisdiction is not wanting a directory provision can be waived. But a mandatory provision can only be waived if it is not conceived in the public interest but in the interest of the party that waives it. Even it is assumed that the provision in S.35 is mandatory, on a true construction of that section, it is clear that it is intended only for the benefit of the judgment-debtor and Therefore he can waive the right conferred on him under that section. If that be the legal position O. 21 R. 90 is immediately attracted.

(6) Similar is the ratio in *Holmes v. Russell* (1841) 9 Dow 487 wherein Justice Coleridge observed as follows:

IT is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine What is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity.

(7) Thus, it follows that if the provision of a statute is only directory, an act done in contravention thereof is only an irregularity and not a nullity. Even if a provision is mandatory, , act done in contravention of it is not necessarily a nullity, if the same can be waived by a party for whose benefit it is introduced

(8) The proclamation of sale is to be drawn up under Rule 66 of Order 21 after notice to the decree-holder and the judgment- debtor and the proclamation shall state the time and place of sale, and specify as fairly and accurately as possible the following details :- 2(a) : the property to be sold (or, where a part of the property would be sufficient to satisfy the decree. such part); the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government; any incumbrance to which the property is liable: the amount for the recovery of which the sale is ordered; and every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property." Corporation & another

(9) So, if a notice under Order 21 Rule 66(2) is to be issued to the judgment-debtor he is to specify in reply to that notice the aforesaid matters which are to

be the contents of the sale proclamation and the perusal of the aforesaid details would go to show that the right of the judgment-debtor in respect of the same extends in respect of the property to be sold or where the part of property would be sufficient to satisfy the decree, such part. It should not be difficult to say that this right of the judgment-debtor can be conveniently waived by him and if that is so, the omission of giving the notice to judgment-debtor under Order 21 Rule 66 is only irregularity and non-compliance with the provision regarding notice will not make the sale a nullity. Section 35 of the Bengal Money Lenders' Act which was dealt with in Dhirendra Nath Gorai's case (supra) was meant for still greater protection of the judgment-debtor in execution of a decree passed in respect of a debtor than what was provided for and contemplated by sub-clause (a) of Sub-rule (2) of Rule 66 of Order 21 of the CPC inasmuch as the former provides that the sale proclamation shall specify only so much of the property of the judgment-debtor as the court considers to be saleable at a price sufficient to satisfy the decree, and the property so specified shall not be sold at a price which is less than the price specified in such proclamation. When the breach of the more protective provision for the judgment-debtor that is a breach of S.35 of the Bengal Money Lenders Act (10 of 1940) was held only an irregularity to be taken note of under Order 21 Rule 90 of the Code of Civil Procedure, the omission to give notice under Order 21 Rule 66 C.P.C. would also be only an irregularity to be dealt with under Order 21 Rule 90 CPC. Though the aforesaid Supreme Court Authority in Dhirendra Nath Gorai's case (supra) does not afford a direct authority in regard to the effect of the omission to give notice under Order 21 Rule 66, the test laid down therein is of great help in deciding the effect of the omission of such a notice.

(10) There is a long catena of authorities by various High Courts holding that the omission to give a notice under Order 21 Rule 66 is only an irregularity to be dealt with under Order 21 Rule 90 CPC and not an illegality rendering the auction sale void u/s 47 of the Code. Dealing with this question Sundrabai Ramchandra Rabade and Another Vs. Anandrao Haribhau Rabade and Another, held that the provision as to notice of auction contained in sub-rule (2) of Rule 66 of Order 21 was not mandatory and so non-service of notice upon the judgment-debtor would only render the subsequent sale violable at his instance and "hence the application by the judgment-debtor for setting aside the sale shall be filed under O.21 R.90 and not under S.47. In this authority the use of expression "shall" in sub. r. (2) of R. 66 was present to the mind of the Judges but they were of the opinion that the question would be one of intention of the legislature and that would have to be ascertained having regard to the subject matter, the importance of the relevant provision and the relation of the provision to the general object intending to be secured by the enactment and further that the construction attributing imperative character to the said provision would cause serious inconvenience or injustice to innocent auction purchasers would have to be considered. They also considered the scheme of O.21 CPC and the stage at which R. 66 occurred and after consideration of all those factors came to the

conclusion that the provision of notice under R.66 would have to be regarded as directory and not mandatory. This authority overruled Dadanarayan Thakre's case (supra) relied upon by the learned counsel for the judgment-debtor which in turn had relied upon Narayan Purushottam Banson's case (supra) which had also been relied upon by the learned counsel for the judgment-debtors. In *Sunderabai v. Moreshwar* Air 1969 Bom. 178 where the court did issue a notice under O.21 R.66 CPC but it was not served in accordance with law. inasmuch as it was served on a person who was stranger to the judgment-debtor, and this was due to the mistake not of the court but of the bailiff of the court, it was that there was no question of any illegality involved in the case and what had happened was only an irregularity and as that irregularity had led to the non-appearance of the judgment-debtor it must be regarded as material irregularity and was also held in the same authority that the proceedings relating to a sale begin from the time an order is made under O.21 R.64 and the moment any further proceedings are started by the court thereafter the court necessarily takes all those proceedings in order that prospective sale may be proclaimed and a notice under Order 21 Rule 66 to the judgment-debtor is an important step towards the preparation of the publication of the sale and if that notice has not come to be served upon the judgment-debtor, then, the irregularity must be considered to be one which has occurred in the publication of a sale.

(11) In *Govinda Menon Vs. Varkey and Others*, , it was held that want of notice under Order 21 Rule 66 to the judgment-debtors before settlement of proclamation did not make the sale that followed on such a proclamation void and that the sale had to be set aside in appropriate proceedings on application. This was also the view expressed by the Kerala High Court in *Kuttikrishnan Nair Vs. Madhavan Nair*, and in *Kunjan Raman v. Cheria* (1960) 1 Ker L. R. 315 which were approved in the aforesaid Full Bench authority of Kerala High Court. The authority reported as *Thommen Thomas v. John Simon and others* Air 1957 Tra 153 also holds that the want of notice under Order 21 Rule 66 in regard to the settlement of proclamation constitutes only a material irregularity and does not affect the jurisdiction of the court. In *Indar Ram and another v. Lila Dhar* Air 1938 Lah 152 it was found that the sale took place without the court having given a notice to the judgment-debtor under order 21 Rule 66 sub-rule (2) and held that this was certainly a material irregularity. According to *Jaggan Nath v. Daud and others* Air 1923 Lah 592 failure of the Court to issue notice under Order 21 Rule 66, before drawing up the proclamation of the sale is an irregularity in publishing or conducting the sale within Rule 90. According to *Hara Singh v. Labh Singh and others* Air 1935 Lah 962 the fact that no notice was issued under order 21 Rule 66 Civil Procedure Code. though a material irregularity does not of itself vitiate the sale. To the same effect is *Kanhya Lal and Ors. v. Megh Raj and others* Air 1927 Lah 84. In *Uma Datt Vs. R.K. Sardana and Another*, , it was observed that the violation on the part of the court regarding the provisions of Order 21 Rules 66 and 67 read with Rule 54 of CPC were mere irregularities, which in order to enable the judgment-debtor to avoid the sale, must lead to substantial injury. We

find it difficult to disagree with the dictum laid down in the aforesaid authorities that the non-issuance of notice under Order 21 Rule 66 sub-rule (2) C.P.C. to the judgment-debtor is only a material irregularity to be dealt with under Order 21 Rule 90, and does not by itself vitiate the sale as nullity. It may also be mentioned incidentally that in their objections the judgment-debtors had not taken up the objection as to the want of such notice to them and this objection was raised only during the course of arguments before the learned Single Judge and thereafter before this Bench too.

(12) The learned counsel for the objectors/judgment-debtor pointed out certain other infirmities in the matter of the auction sale. He has contended that the auction sale in respect of the cinema in question which had started on 29-8-1977 and which remained incomplete on that day could not be adjourned by the court-auctioneer as he had no authority to do so. As provided in Order 21 Rule 69 CPC an officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournments but where a sale is adjourned for a period longer than, 30 days, a fresh proclamation under Rule 67 shall be, made, unless the judgment-debtor objector consents to waive it. The sale was adjourned by the court auctioneer from 29-8-77 to 1-9-77 and as the sale was adjourned for a short period within 30 days, no fresh proclamation under Rule 67 was necessary. The court auctioneer also recorded reason for this adjournment and the same was that it was 1.00 P.M. and it was thought that there may be some higher bidders and with that -end in view the auction was adjourned to 1-9-1977 for being continue from 10.00 A.M. to 1.00 P.M. and the endorsement bears the signatures of the court auctioneer. The sale time had been fixed by the Registrar of the court from 10.00 A.M. to 1 .00 P.M. vide order dated 20-7-1977 and, thus, the reason given by the court auctioneer was quite valid.

(13) It was also contended on behalf of the judgment debtors Objectors that the court auctioneer had not announced at the spot the date to which the sale had been adjourned by him. It was contended that the bid-sheet which mentioned that the adjourned date was announced at the spot had not been proved on the records of the case. It was further pointed out on behalf of the objectors/Judgment-debtors that even though one of their witnesses Swaranjit Singh (OW1) who was one of the bidders on 29-8-1977 had admitted his signatures at points A, B and C on the bid-sheet, the same did not and could not prove the contents of the bid-sheet and in support of this contention the learned counsel for the objectors relied upon Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import, , Mohammed Yusuf and Another Vs. D. and Another, and Madholal Sindhu Vs. Asian Assurance Co. Ltd. and Others, according to which the mere proof of the hand-writing on the document would not tantamount to prove the contents or correctness thereof.

(14) It was urged that the court auctioneer who prepared the bad-sheet ought to have been examined in the witness-box to prove the truthfulness of the contents of the bid-sheet, especially the endorsement purporting to be in respect of the

adjournment of the sale and the reason Therefore purporting to be signed by the court auctioneer. This objection was also raised on behalf of the judgment-debtors/objectors before the learned Single Judge who rejected the same on the ground that these authorities related to ordinary documents which were produced by one of the parties to those cases, in contra-distinction to the report of court auctioneer who goes to the spot with the authority of the court for doing the job of auctioning of a property and whatever report is submitted by him is to be taken as correct and is to be acted up unless proved otherwise. We can find no fault with the aforesaid view of the learned Single Judge and the report of the court auctioneer is to be given a presumption of truth unless there is cogent evidence from the side of the Objectors to disprove the same. The factum of the admission of Swaranjit Singh (OWI) in respect of his signatures appearing on the bid-sheet convincingly proves that the bid-sheet was prepared at the spot by the court auctioneer lending reliability to the factum which finds mention therein that the adjournment of sale to 1-9-1977 was announced at the spot. Even the appreciation of the evidence of the Objectors on this point by the learned Single Judge appears to be without a blemish. He discarded the testimony of Swaranjit Singh (OWI) for the reason that this witness conceded that he did not remember whether the date for the next auction was announced on that day or not, even though this witness was one of the bidders on 28-8-1977 and had also stated that as the time was over auction would be re-held after publishing the notice of the date and time etc. of the auction in the newspaper. He could have specifically excluded the possibility of the announcement of the adjournment of sale by specifically denying the same and should not have left simply to his memory by saying that he did not remember the same. The second witness Lalit Kumar Bhargava (OW2) who alleges his presence at the time of the auction non the first day, i.e. 29-8-1977 but had not given the bid and was simply going to bid when he was informed that the time for auction was over. He made a statement that he had carried a sum of Rs. 2,25,000.00 in cash with him on that day and was maintaining a regular account. He was afforded an opportunity by the learned Single Judge on the request of the learned counsel for auction-purchaser to produce copies of his accounts for 27th and 29th August 1977 by 12-2-1981 but this witness did not produce the same and the learned Single Judge was right in disbelieving this witness totally even on the point that the auctioneer had adjourned the auction with an announcement that the next date of auction would be published in the newspaper, The third witness was the judgment debtor/Objector Shamimuddin (OW3). His testimony was also descended by the learned Single Judge for the reason that he conceded in: his cross examination that he was not present at the time of the auction on 29-8-1977, even though earlier in his testimony-in-chief he had the temerity to depose that the adjourned date of auction was not announced by the auctioneer on 29-8-77. Report of the court auctioneer stands on the same footing as the report of the local commissioner who is appointed by the court for local investigation of certain facts pertaining to the case. According to well established law the report of the Commissioner together with evidence, if any, recorded by him, is legal evidence and the fact

that he is not examined at the trial cannot make his report inadmissible in evidence and the authorities on this point are Harbhajan Singh Vs. Shakuntala Devi Sharma and Another, , State of U.P. Vs. Smt. Ram Sri and Another, , Vemuseti Appayamma Vs. Lakshman Sahu, ; Ramautar Gope and Others Vs. Sheonandan Mistri and Others, , According to the last mentioned two authorities report of commissioner forms part of the records of the case. The report of the court auctioneer standing on the same footing as that of the local commissioner, it was immaterial that the court auctioneer was not examined by the auction-purchaser to prove his report which is even otherwise parse legal evidence in the case. Illustration (e) of Section 114 of the Indian Evidence Act. 1872 also lends assurance to the correctness of the aforesaid endorsement of the court auctioneer regarding the announcement of the adjourned date of the auction sale as official acts are presumed to have been regularly performed.

(15) The learned counsel for the objectors also assailed the finding of the learned Single Judge in regard to the price of the property in question fetched in the auction sale alleging the same to be highly inadequate. The price fetched is Rs. 4,35,000.00 in respect of 28/48 shares in this property. It was contended that even the price of the site underneath Shalimar Cinema in question would fetch a price higher than Rs. 4,35,0001-. The sum in substance that the learned Single Judge held on this point was that Shalimar Cinema in question was in shambles and eclipsed by flyover and dirty surroundings and that the assertions of the finesses of the Objectors and Shaimudin-Objector himself were of no value because the same were merely opinions. One other factor which also weighed with the learned Single Judge in coming to the conclusion as to the adequacy of the price was that on 29-8-1977 the first date of auction, the highest bid received was only Rs. 3 lacs as a result of which the court auctioneer did not think it reasonable to finish the auction on that price and then adjourned the auction to 1st September, 1977 in the hope of receiving higher price in auction. The learned Single Judge also did not find it feasible to compare the value of the cinema in question with Paras Cinema in view of the different location, situation and condition of the two cinema and Shalimar Cinema having been constructed much earlier, and being in shambles and eclipsed by the flyover and dirty surroundings whereas Paras Cinema being situated in a posh locality.

(16) According to the testimony of Suraj Prakash Dhwl Shalimar Cinema is situated in slum and dirty area and its surroundings are also very dirty and even cattle are tethered there and it is inhabited by low-income group of people dwelling in huts and that the road in front of this cinema is not even 20 feet wide. He further stated that only second rate and very old motion pictures were exhibited in this cinema and in the year 1973 construction thereof was ordinary, partly kacha and partly with brick work without cement, and the kacha portion consisted of the varandah and the office. By the word "kacha" he meant that the walls were thin ones and could not bear the load of second storey. He categorically denied the suggestion that the construction of the cinema was a first rate one. He also denied the suggestion that this cinema was surrounded by posh

localities saying further that colonies like Maharani Bagh, Jaag Pura and Friends Colony were quite far off from the same. Mr. O.P. Malhotra (APW-1) is the auction- purchaser and according to him Shalimar Cinema is situated in poor locality, was in shambles and eclipsed by a flyover and was not running when auction took place. He denied the suggestion that the value of this cinema in 1977 was not less than Rs. 20 lakhs or that a number of persons were prevented from giving bids on 1st September, 1977. The auction-purchaser is the owner of "Paras Cinema", the plot for which was purchased in the year 1969 for a price of Rs. 10,15,000 and the area of that plot was 2200 sq. yds. on which the construction actually existed. During the course of arguments it was conceded that the total area of this plot was 5000 sq. yds. The area of the plot of Shalimar Cinema is not known as there is no evidence on the records of the case in respect of the same. The real difficulty with the Shalimar Cinema in question and the land under-neat the same is that they are situated in a slum locality and this building is in shambles and eclipsed by a flyover and is, thus, in no way comparable to a posh cinema like Paras Cinema which is situated in an area approximated by posh localities. It cannot be said that land in Delhi in whatever area carried an equally high price and the land situated in a slum area cannot be as costly as the land in posh locality and in this view of the matter it cannot be said that Shalimar Cinema in question fetched an inadequate price in the auction-sale, especially when the bonus of proving the inadequacy of price having been on the Objectors /judgment-debtors, the evidence produced by them in this regard was hardly worthwhile, as the same was not in the form of any reliable evidence. Not even the Valuer's report was sought to be produced by the Objectors, nor any evidence regarding the market price of any land or building of that slum locality wherein Shalimar Cinema is situated or of any other slum locality in Delhi, and the testimony of their two witnesses OW1 Swaranjit Singh that he was prepared- to buy The judgment-debtors" shares in this cinema for about Rs. 12 lacs and OW2 Lalit Kumar Bhargava that he was prepared to purchase the same for Rs. 8 lacs to Rs. 9 lacs, is just their fanciful opinion hardly worth any reliance especially when the highest bid on the first day of the auction reached only the sum of Rs. 3 lacs looking to the probable inadequacy of which the court auctioneer had the sagacity of adjourning the sale to 1-9-1977 on which date also the highest bid could not exceed Rs 4,35,000. It is a matter of common knowledge that in auction sales the property sold may not fetch a price equal to its market price.

(17) It was also contended on behalf of the Objectors / Judgment-debtors that they had brought one witness, namely, Harprit Singh before "the learned Single Judge on 1-9-1981 during the course of evidence but he was not allowed to be examined by the learned Single Judge and was discharged. The perusal of the order dated 1-9-1981 of the learned Single Judge shows that though this witness was present in Court on that day and the Objectors wanted to examine him as their witness but he was not allowed to be examined for the reason that vide an earlier order dated 23-4-1981 examine of that witness had been disallowed. The

order date 23-4-1981 of the learned Single Judge shows that the name of that witness did not appear in the list of witnesses submitted by the Objectors under Order 16 Rule I of the CPC and an application had been made by the Objectors whereby they wanted to summon and examine him. The learned Single Judge after setting out the provisions of law contained in Order 16 Rule I sub-rule (3) came to the opinion that it had not been stated to what prevented the Objectors from including the name of this witness in their list of witnesses. It was contended on behalf of the Objectors that when this witness was present before the learned Single Judge he ought to have been allowed to be examined in the witness-box by the judgment-debtors and the rejection of their prayer in this regard caused much prejudice to them in proving the factum of the adequacy of the price fetched by Shalimar Cinema in the auction sale. Under Order 15 Rule 1(3) of the Civil Procedure Code, the Court may, for reasons to be recorded.. permit a party to call, whether by summoning through court or otherwise, any witness, other than those whose names appear in the list of witnesses required to be furnished under Order 16 Rule 1(1). if such party shows sufficient cause for the omission to mention the name of such witness in the said list. The bare reading of this provision of law contained in sub-rules (1) and (3) come o show that the filing of the list of witnesses is mandatory and if the court has to allow the summoning of a witness not mentioned in the list of witnesses, it has to record reasons for the same meaning thereby that normally a witness not included in the list of witnesses is not to be allowed to be summoned and it is only by way of an exception that for reasons to be recorded such a witness is allowed to be summoned. The learned Single Judge did not find any sufficient cause for the omission on the part of the Objector in mentioning the name of Harprit Singh in their list of witnesses and the discretion exercised therein by the learned Single judge does not look patently unjust or perverse and this cannot be interfered with in appeal The second contention of the learned counsel for the Objectors that when subsequently he was actually brought in Court during the course of evidence and prayer was made to the learned if Single Judge to allow the Objectors to examine him in the witness-box but the same who disallowed unjustly, cannot be accepted because the learned Single Judge had already disallowed the summoning and the examination of this witness vide his order dated 23-4-1981 for which reason the learned Single Judge finding himself bound by his previous order, had to recto the prayer made subsequently on 1-9-1981 for examining this witness even though he was present in Court on that day. The learned counsel for Objectors relied upon Sain Dass Vs. Narain Singh, and Miss Karim Bakhah v. Firm Thakar Das -Ram Lal and others Air 1941 Lah 38(26). In the former authority it is held that where an application to produce a material witness states that the omission to include his name in the list was by inadvertence .it would be wrong for the court to dismiss it. without applying its mind to the other considerations, on the only ground that the omission of the name by inadvertence was no reason at all. in the latter authority it has been ruled that the rule exhibited in Order 16 Rule 1 CPC gives the court discretion to allow witnesses to be examined even if they are not

mentioned in (the list of witnesses, if it is satisfied that there are sufficient reasons for doing an end that the rule should not be applied" "mechanically The perusal of the order dated 23-4-1981 passed by the learned Single Judge shows that he was not only of the opinion that mentioning simply that there was a bona-fide omission, did not amount to a sufficient cause within the meaning of Order 16 Rule 1 (3) CPC but was further of the view that that application of the Objectors was to be seen in the context also that the auction sale had been held more than three years ago and still the objections were pending and the capital of the auction purchaser stood blocked up and the decree-holder had also not been paid anything. The learned Single Judge recorded reasons against that application of the Objectors which he was not bound or even required under the aforesaid provision of law and the reasons had to be recorded by him only if he was inclined to accept that application which means that he could have dismissed that application even without giving reasons though he was cautious enough to give reasons for rejecting the same So, it cannot be said that there was no application of mind while rejecting that application and it was not only for the reasons that the phrase "bona-fide omission" used in that application held as not amounting to a sufficient cause, that: the said application was rejected. The testimony of Harprit Singh appears to have been needed by the objectors for the reason (that he was also one of the bidders in the authorities in 20-6-77. So, this is also just like the two witnesses Col. Swaranjit Singh and OWS Iqbal Kumar Bhargava who were also the bidders in that auction and his testimony could hardly improve the matter for the objectors as testimony of the two witnesses could not help the objectors in determining the question of inadequacy of price fetched by Shalimar Cinema in the auction sale.

(18) The decree-holder had suggested the estimated price of the entire cinema in question at Rs. 8 lacs and the auction sale of cinema was only in respect of 28(48 share (herein and not in respect of the whole of it. The price fetched for shares of the cinema at the auction sale was to the tune of Rs. 4,35,000/-. It was contended by the learned counsel for the Objectors that the auction sale made of manoeuvring on the part of the decree-holder, auction-purchaser and the court auctioneer for the reason and in the sense that the price of Rs. 4,35,000.00 represented almost 60 per cent of the total declared estimated price of Rs. 8 lacs which had been suggested by the decree-holder for being inserted in the proclamation of sale and 28(48 share of the entire cinema also represented about 60 per cent of the sale. Much significance cannot be attached to this argument as the aforesaid figures can also go to suggest that the price fetched ultimately justified the correctness of the estimated value of Rs. 8 lacs suggested by the decree-holder.

(19) It was pointed out by the learned counsel for the auction-purchaser that the Objectors had filed an application being E. A. 3011/1977 dated 30-9-77 under Order 21 Rule 89 of the CPC for setting aside the sale of the machinery and Shalimar Cinema and also deposited along with that application a bank-draft No. 1990651197177 dated 30-9-77 for Rs. 2,17,000 of Lakshmi Commercial Bank,

Kashmere Gate, Delhi for payment of the decretal amount to the decreeholder and also for payment of 5 per cent amount to the auction-purchaser. The aforesaid amount had been given to the Objectors by another Objector Hanuman Pershad for the said purpose as stated in the objections dated 29-9-77 of Hanuman Pershad being Ea 313 of 1977 Order Xxi Rule 89 (2) of the Civil Procedure Code. reads as follows :

WHERE a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule"

(20) Because on the date the application under Order. Xxi Rule 89 was presented, the application under Order Xxi Rule 90 was already pending and had not been withdrawn, the application under Order Xxi Rule 85 could not be made. The perusal of the order dated 31-3-1978 passed by R. S. Joshi J. shows that the counsel for the judgment-debtors submitted that he would not prosecute his application under Order Xxi Rule 89 and that the same was, Therefore, dismissed. The aforesaid amount of Rs. 2,17,0001- was then with drawn by Hanuman Pershad. It was contended, and rightly, by the learned counsel for the auction-purchaser that the withdrawal of the application under Order 21 Rule 89, CPC by the Objectors / Judgment-debtors even after depositing the aforesaid amount of Rs. 2,17,0001- and by their not withdrawing their objections under Order 21 Rule 90 before making such an application, simply showed the mala fides on the part of the judgment-debtors / Objectors, and for that reason they could be presumed to be satisfied with the price fetched by Shalimar Cinema in the auction sale., as adequate and the contention of the learned counsel for the appellant that the said application fell through due to dispute between Hanuman Parsad and the judgment-debtors hardly commends itself especially when somebody else could have been substituted by the judgment debtors in place of Hanuman Prasad and more so their witnesses who, according to their own testimony, were prepared to purchase this Cinema at higher prices.

(21) For the reasons aforesaid we are not prepared to accept the contentions raised on behalf of the judgment-debtors regarding inadequacy of price fetched by 28148 share of Shalimar Cinema in question in the auction sale and the contentions appears to be more imaginary than real.

(22) Under Order 21 Rule 90 Civil Procedure Code. an application may be made to the court to set aside the sale on the ground of a material irregularity of fraud in publishing or conducting it. but no sale shall be set aside on these grounds unless, upon the facts proved, the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or Corporation & another fraud. The learned Single Judge who had held against the inadequacy of the price fetched in auction sale. was of the opinion that even if it was presumed for the sake of arguments that the. price fetched was inadequate, inadequacy not having been linked with any irregularity, the sale could not be set aside and he relied upon Uma Datt's case (supra) and Shri Radhey Shyam Vs. Shyam

Behari Singh, . The former authority held as follows :--

...But assuming the price to be inadequate (and it may be remembered that at Court sales, normally, the property fetches lower than open market price), it must be shown to have been caused as a result of the alleged irregularity. It is well settled that. the irregularity and the substantial injury must be correlated with each other as cause and effect. which is, quite clearly, not established in the present case. Injury cannot be inferred from proof of irregularity and mere inadequacy of price is normally speaking, no ground by itself for setting aside the sale. In the absence of cogent material to the contrary, price fetched at Court sale may well be presumed to be adequate."

The latter authority held as under :

IN order to set aside an auction sale mere proof of a material irregularity such as the one under Rule 69 and inadequacy of price realised in such a sale. in other words injury, is not sufficient, what has to be established is that there was not only inadequacy of the price but that that inadequacy was caused by reason of the material irregularity of fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity.

(23) On the other hand, the learned counsel for the judgment- debtors objectors has relied upon Navalkha and Sons Vs. Ramanuja Das and Others, and Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others, . The former authority is under the Companies Act and it held as follows :

WHERE the acceptance of the offer by the Commissioners is subject to confirmation the Court the offered or does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the Court operates as a safe guard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the .sale. In every case it is the duty of the Court to satisfy itself that, having regard to the market value of the property, the price offered is reasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion."

(24) The latter authority after setting out the aforesaid principles laid-down in Navalakha and Sons" case (supra) proceeded to observe as follows :

BE it by a receiver, commissioner, liquidator or Court this principle must govern. This proposition has been propounded in many rulings cited before us and summed up by the High Courts. The expressions material irregularity in the conduct of the sale must be benignantly construed to cover the climax act of the Court accepting the highest bid. Indeed, under the Civil Procedure Code, it in the Court which conducts the sale and its duty to apply its mind to the material factors bearing on the reasonableness of the price offered is part of the process of obtaining a proper price in the course of the sale. Therefore, failure to

apply its mind to this aspect of the conduct of the sale may amount to material irregularity mere, substantial injury without material irregularity is not enough even as material irregularity not linked directly to inadequacy of the price is insufficient. And where a Court mechanically conducts the sale or routinely sums assent to the sale papers, not bothering to see if the offer is too low and a better price could have been obtained, and in fact the price is substantially inadequate, there is the presence of both the elements of irregularity and injury. But it is not as if the Court should go on adjourning the sale till a good price is got, it being a notorious fact that Court sales and market prices are distant neighbours. Otherwise, decree-holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. May be, subsequent events, not within the ken of the executing Court when holding the sale, may prove, that had the sale been adjourned a better price could have been had. What is expected of the judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors, and, if satisfied that, in the given circumstances, the bid is acceptable, conclude the sale. The Court may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise, a new threat to certainty of Court sales will be introduced.

The Supreme Court dealt with the matter under Order 21 Rule 90 Civil Procedure Code. and according to this authority even shoo-in there should be a link between the material irregularity and substantial injury as provided in Order 21 Rule 90, never class when the price fetched in auction sale is substantially inadequate, there is the presence of both the elements of irregularity and injury. In other words, the link between irregularity and injury shall be presumed on account of a substantially inadequate price fetched. We have already held, agreeing with the learned Single Judge, that there is no inadequacy in respect of the price fetched by the auction sale of ShaHmar Cinema. In fact, there is hardly any evidence produced by the Objectors regarding the market value of the property in question with which the price fetched in auction sale could be compared so as to come to the conclusion regarding the price fetched being grossly inadequate, and so the co-relation of irregularity and injury cannot be presumed.

(25) Even otherwise no co-relation or link between material irregularity and injury stands established, even if it is presumed that the price fetched in auction sale is inadequate. The material irregularity in this case has been only in the omission of the notice to the Objector judgment-debtors under Order 21 Rule 66(2). Such a notice is to go not only to the judgment-debtors but also to the

decree-holder and the decree-holder can furnish the details required to be given in the aforesaid provision of law. There is hardly anything in the requirement of Order 21 Rule. 66(2) which could have relevance for the Shalimar Cinema in question regarding the price fetched by it in auction sale. During the course of arguments we asked the learned counsel for the Objectors/judgment-debtors as to how and in what manner inadequate price could be fetched by the Shalimar Cinema in question in auction sale for want of the aforesaid notice to them and he pointed out that if such a notice had been given to them, they would have suggested, under clause (e) of sub-rule (2) of Rule 66 the value of the Cinema which could have been then mentioned in the same proclamation. It is a matter to be remembered that even if any value had been suggested by the Objectors/judgment-debtors in response to such a notice, and had the same also found mention in the sale proclamation, there would have been no obligation on the part of the court auctioneer to commence auction sale with a minimum price having reference to that value and even the bidders would have been free to bid in an unfettered manner without reference to the value suggested by the judgment-debtors in the sale proclamation. So, even this contention of the learned counsel for the Objectors/Judgment-debtor has no force.

(26) No other contention was urged at the bar and in view of what has been stated above, there appears to be no ground for interference with the order under appeal and consequently the appeal is dismissed leaving, however, the parties to bear their own costs.